Supreme Court, U.S.
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No. 01-760

In The

# Supreme Court of the United States

KELVIN J. HURDLE,

*Petitioner,*

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION

JERRY W. KILGORE
Attorney General of Virginia

JUDITH WILLIAMS JAGDMANN
Deputy Attorney General

GUY W. HORSLEY, JR.
Senior Assistant Attorney General

MARTHA M. PARRISH*
Assistant Attorney General

**Counsel of Record*

Commonwealth of Virginia
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
804-786-5632

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

## QUESTIONS PRESENTED

I. Is the Time-barred 1998 Demotion Unrelated to the Disparate Treatment Allegations and thus, not Revived under the Continuing Violation Doctrine?

II. Whether an Affirmance of the Award of Summary Judgment for the Employer is Mandated given the Appellant's Lack of Proof Supporting any Intent to Discriminate on the Basis of Race?

III. Do the Undisputed Facts Fail to Establish a Racially Hostile Environment Claim as a Matter of Law?

IV. Does the Undisputed Fact that the Negative Evaluations Began Before the Protected Activity Occurred Cut the Causal Connection Required for a Prima Facie Claim of Retaliation?

V. Are the Due Process Claims Foreclosed by Plaintiff's Failure to Name a Proper Party Defendant?

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## STATEMENT OF FACTS

Kelvin J. Hurdle ("Hurdle" or "Petitioner"), an African-American male and former employee of the Virginia Department of Environmental Quality ("DEQ"), brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981 for damages caused by DEQ's allegedly unlawful employment practices. Specifically, he alleges in his Complaint that the agency demoted him in 1998 from a Training Manager position because of his race and that his duties were assigned to a white male. He also asserts that once demoted to an Environmental Engineer Senior position, he was subjected to disparate treatment because of his race. Among the disparate treatment allegations lodged against his supervisor was a practice of approving extra pay for white counterparts to complete projects while he was routinely denied such pay. Hurdle alleges that his supervisor treated him with malice and condescension, citing derogatory and "racially foul" comments. He also alleges that he was denied access to a computer disc, which was made available to white co-workers. This coupled with "fraudulent" performance ratings allegedly created a hostile work environment. He asserts that the erroneous ratings were retaliatory for discussing Title VII issues with an investigative state agency, a protected activity. Hurdle seeks declaratory and injunctive relief, as well as compensatory and punitive damages and attorney's fees.

As required in Rule 15.2 of the Rules of this Court, DEQ first responds to the Petitioner's Statement of the Case, which contains several misstatements of the facts contained in the district court's record. Respondent

respectfully asks that this Court consider, instead, the exhaustive summary of undisputed facts in the district court's opinion. *See* pages 5-10 of the Appendix ("App.") attached to the Petition. The district court's summary reflects that Hurdle's response to DEQ's Motion for Summary Judgment (and its eleven detailed Enclosures ("Encl."), Affidavits ("Aff's"), Exhibits ("Exh") and deposition excerpts ("Depo. Tr.") added no additional detail to Hurdle's deposition testimony and interrogatory responses. Neither did his response contain any corroboration from co-workers, nor, despite his characterization, any material disputes. There was simply no evidence that anyone at DEQ treated Hurdle differently because of his race. Instead, it was crystal clear that four levels of DEQ management struggled to deal with his criticisms and dissatisfactions, as they gave him opportunity after opportunity to improve his performance.

Chief among the misstatements is the new assertion that David Paylor "motivated the continued discrimination" because of his role in the demotion of Hurdle from Training Manager to Environmental Engineer Senior and the improper classification of the Training Manager's position. This vague assertion of wrongdoing is a transparent attempt to overcome his attorney's concession and the district court's ruling that John Cunningham, the African American senior manager who demoted him, was not involved with his later allegations of disparate treatment and hostile environment. He hopes that this unsupported assertion of a role for David Paylor will negate the district court's ruling that the demotion was a separate act and, thus, is time barred.

Hurdle also misstates the factual findings with regard to the alleged disparate treatment he received while supervised by Howard Freeland. The district court considered the affidavits and documents submitted by the parties and concluded that the agency's policy for earning compensatory time was given only upon prior permission for out-of-the-ordinary tasks. *See* App. at 8. It is undisputed that in February, 2000, DEQ provided documentation to the investigating state agency that recorded to whom "comp time" was given and for what reasons, specifically listing Maria and Larry Syverson. Defendant's Encl. II, Freeland Aff., Exh. 3. The policy allowed it for those employees attending public meetings or doing field work, but not for regular work such as reviewing annual reports. Hurdle responded to DEQ's factual assertion that he was not entitled to this perceived benefit by relying on unsworn hearsay information attributed to a co-worker. At his deposition, however, Hurdle conceded that Maria Williams had earned more "comp time" because she went to more public meetings at night. Encl. I, Hurdle Depo. Tr., pp. 229-30. He also must concede that he, himself, has received compensatory time, but only for working on the deadline day for annual report submissions and for attending public meetings, both special exceptions to the general rule. Encl. II, Freeland Aff. 16. Thus, contrary to his bare assertion, Hurdle brought on no proof that his requests were routinely denied on the basis of his race.

Another aspect of his disparate treatment claim concerns an inexplicable allegation that DEQ intentionally denied him access to a computer disc that contained historical information helpful to the completion of his job

duties. As stated by the district court, DEQ refuted this allegation in Freeland's affidavit, who had no prior knowledge of this claim, but noted that the disc was available to all employees throughout Hurdle's time as a permit writer. In sum, the allegations of deficient training, disproportional workload, supervisory support and access to this database were characterized by the district court as workplace "disputes." The court, however, found "the complete absence of any evidence that Hurdle experienced treatment based on race." *See* App. at 7, 16.

Hurdle also misstates the facts with regard to the creation of a racially hostile environment, making reference to workers who witnessed hostile comments made to him by Freeland. Yet, again, he submitted no proof or statements that anyone witnessed any of these interchanges, or any other proof to support his subjective view that the comments were racially motivated.

With regard to Hurdle's statement of facts and argument supporting his retaliation claim, he suggests that his problems started when he complained to a state EEO office on August 26, 1999, and continued to December 3, 1999, when he attempted to discuss Title VII concerns. *See* Petition at 4-5, 18-19. In prior submissions, he linked retaliatory acts to the May 2000 filing of his lawsuit. He now suggests, and raises for the first time in this litigation, that DEQ's reluctance to talk to him about his Title VII concerns was also a denial of due process. The facts relevant to retaliation are, instead, those covered by the district court opinion at pages 9-10 of the App. The retaliation action rises and falls on the undisputed timing of his August 26, 1999, complaint to the Virginia Department of Personnel and Training's EEO Office, his July 16,

1999, interim evaluation and his 1999 annual evaluation dated September 23, 1999. Moreover, it is equally undisputed that none of these evaluations had any effect on his salary. *See* district court's opinion, App. at 22.

Respondent notes that the Petitioner's Appendix does not contain the Complaint or the briefs and enclosures submitted to the district court with DEQ's Motion for Summary Judgment, Hurdle's Reply Brief or DEQ's Rebuttal Brief. These are available to the Court in the fourth circuit's record in the event resolution of this Petition requires such a review or, alternatively, if deemed necessary for proper review, the Respondent respectfully offers to prepare a Supplemental Appendix.

## REASONS FOR DENYING THE WRIT

DEQ restates the questions presented by this Petition in order to clarify the issues before this Court. As affirmed by the Fourth Circuit Court of Appeals, the district court appropriately awarded summary judgment in this case because no reasonable juror could find from the undisputed facts that Hurdle was the victim of Title VII disparate treatment, harassment from a racially hostile environment or retaliation.

Although determination of motive sometimes requires credibility determinations, this is not such a case. This record documents in voluminous detail (through sworn affidavits, deposition excerpts and documents) why Hurdle was reassigned and why his performance was failing. The employer has legitimate reasons for every action taken and none of them were proven false by

Hurdle. Supervisors Freeland and Syverson cannot be painted as the persons responsible for Hurdle's circumstances. John Cunningham, an African American, demoted and reassigned Hurdle. Hassan Vakili, an Indian by birth, counseled Hurdle and concluded that his dissatisfaction began when his previously lax work schedule was scrutinized and altered. Female supervisors, Leslie Romanchik and Karen Sismour, have approved every personnel action taken by Howard Freeland and Larry Syverson, white males. Cynthia Houchens, an African American female, complained to Freeland that Hurdle was altering correspondence tracking sheets and not responding to clients. Four levels of management approved every action taken and none of the personnel actions unlawfully affected the terms and conditions of his employment.

Summary judgment pursuant to Rule 56 of the Federal Rule of Civil Procedure is appropriate because this case presents a set of facts in which the plaintiff cannot prevail as a matter of law. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Hurdle could not re-create issues of fact in his affidavit that were established by deposition. *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990) (no issue created simply because plaintiff advances conflicting versions). In addition, his counsel was not allowed at oral argument to argue points without factual support. *Azie v. BellSouth*

*Adver. & Publ. Corp.*, 86 F. Supp. 2d 552, 556-57 (W.D. N.C. 2000), *citing Rountree v. Fairfax County School Bd.*, 933 F.2d 219, 223 (4th Cir. 1991).

### A. Disparate Treatment

#### 1. Demotion/Reassignment

Hurdle's first claim is that his November 1998 demotion/reassignment was motivated by racial animus. The district court, however, ruled that this claim was time barred by Title VII's limitations period, 42 U.S.C. § 2000e-5(e)(1). *See* the district court's analysis in the App. at pages 11-13, setting forth the 300-day filing requirement and the February 9, 2000, date of the EEOC charge at issue, which results in an April 14, 1999, cutoff for that charge. *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 440 (4th Cir. 1998); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Appellant's counsel appropriately conceded this point at oral argument. The claim is not saved by the continuing violation doctrine because as the district court pointed out, all of the discriminatory acts within the covered time period are attributed to Howard Freeland, who had nothing to do with the demotion. The demotion decision was conducted by John Cunningham, DEQ's Director of Administration, a black male. Mr. Cunningham was not involved with the evaluation of Hurdle's 1998-1999 performance, which forms the basis of the timely allegations. Accordingly, the court's conclusion that the demotion is distinct from and unrelated to the remaining claims is supported both by the caselaw and these undisputed facts. *Emmert v. Runyon*, 178 F.3d 1283

(4th Cir. 1999); *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983) (application of continuing violation doctrine requires same type of subject matter, frequency or recurring nature of acts and a lack of permanence such that there is no awareness/no duty to report the initial untimely act). The district court's determination also is consistent with related caselaw establishing that a layoff from employment constitutes a completed act at the time it occurs. *Lawson v. Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982), *quoting Griffin v. Pacific Maritime Asso.*, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973).

As previously stated, Hurdle also raises new facts not established in the district court record regarding David Paylor's role in this decision. Just as he was foreclosed at the circuit level from arguing about Ms. Bobbie Hughes' role in his 1998 demotion/reassignment, which had not been raised at the trial level, so too must this new allegation be disregarded on appeal. Moreover, even if considered, these assertions against Paylor and Hughes have no bearing on the district court's decision on the timeliness issue. Like Mr. Cunningham, Ms. Hughes had no involvement in the performance issues. Mr. Paylor was involved but, ironically, it was he who ultimately raised the evaluation score in 1999. Nothing in the covered period relates back to the reassignment; there has been no related series of acts designed to get rid of Hurdle because of his race. There is no conspiracy pled and no conspiratorial acts taken.

Hurdle's proof also fails to establish this claim on the merits whether through direct evidence of discrimination or indirect evidence through the three-part framework

established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Hurdle's only possible argument of direct evidence is that John Cunningham, an African American, intentionally discriminated against him in the reassignment decision because Hurdle told Cunningham that Freeland was a racist and Cunningham would not believe him. Encl. I, Hurdle Depo. Tr. pp. 127-28. Plaintiff abandoned this assertion during district court briefing and Cunningham categorically denies it. Accepting it for argument's sake, it does not negate the agency's rationale for restructuring, or the stated reasons why Cunningham felt Hurdle would do well in waste permitting. Nothing in Joe Shelton's affidavit (submitted by Petitioner to the district court) proves those reasons to be false.

Hurdle principally relies on the inferential proof scheme of *McDonnell Douglas*, but failed to establish a *prima facie* showing of discrimination: that he (a) is a member of a protected class; (b) he suffered an adverse employment action; (c) at the time, he was performing at a level that met his employer's expectations; and (d) that his position remained open or was filled by a qualified person outside the protected class. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455 (4th Cir. 1989).

Hurdle's personal opinion that he was treated unfairly because he was deemed by Cunningham as unqualified for a desired grade 14, engineer position in air monitoring, is not enough to establish a *prima facie* showing that Cunningham discriminated against him because of his race. *Yarnevic v. Brink's Inc.*, 102 F.3d 753, 757 (4th Cir. 1996) (mere conclusory allegations of motivation do not preclude summary judgment); *Evans v.*

*Technologies Applications & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996) (bald assertions on one's own qualifications do not negate employer's legitimate reasons) *citing Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988). "It is the perception of the decision-maker which is relevant"; the plaintiff's self-assessment does not control. *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980).

If the petitioner's proof of discrimination is evaluated as satisfying the *prima facie* showing requirements, the burden shifts to DEQ to establish legitimate reasons for the allegedly racist reassignment. Because both Paylor and Cunningham articulated legitimate reasons for the reassignment, in lieu of layoff, the burden of production shifts to Hurdle to prove that these proffered reasons are false. To maintain an inference of discrimination and avoid summary judgment, Hurdle must prove that DEQ's stated reasons are false. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false or unworthy of credence, may permit the trier of fact to conclude that the employer discriminated); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

All that Hurdle offers about Cunningham's rationale is that the circumstances are "peculiar and questionable" and "rather suspicious." Petition at 8, 10. He has no proof that he was singled out because of his race. Indeed, his own proof shows that Shelton was twice affected by the same reorganization. If Hurdle was demoted because he was black, then it must be equally true that Shelton was moved because he was white. Both inferences are illogical

and fly in the face of the stated reason that then DEQ Director Dennis Treacy chose to reorganize his administrative branch for reasons of programmatic and fiscal efficiency. Neither man was fired, neither man received a cut in salary. This is not discrimination based on race.

### 2. Deficient Training, Supervisory Support and Access to Tools of Job

In analyzing the four required factors for a *prima facie* case of disparate treatment, the district court noted Hurdle's membership in a protected class and also held that there were material disputes regarding whether he had suffered adverse employment actions and whether he was meeting his employer's expectations. App. at 15. The lower court, *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), therefore, confined its analysis to the fourth factor: whether the undisputed facts, considered in the light most favorable to the plaintiff occurred under circumstances that raised an inference of discrimination. Finding that the facts Hurdle offered through unsworn, conclusory descriptions were insufficient, the district court determined this omission fatal to the continuation of his case.

Taking all of the complaints in Hurdle's response to Interrogatory no. 4, Petition at 13-17, we are left with anecdotal, uncorroborated evidence of poor rapport and unequal access to Freeland for adequate training. *See* Petition at 13-18. Giving Hurdle all fair inferences on this issue, the best evidence is that he felt during the first three to four months on the job that he did not have equal

access to Freeland and observed white employees with better rapport, i.e., Syverson, Bernard and Christie, in his view, got permit training early which enabled them to qualify for overtime opportunities. The description of the informal, on-the-job training for everyone in the waste permitting section, however, was unrebutted and the revision of Hurdle's 1999 performance evaluation for enhanced training and communication opportunities before passing judgment on Hurdle's performance is, likewise, undisputed.

Hurdle's subjective impressions of his lack of access to the tools of the job must be evaluated in light of Freeland's and Romanchik's efforts, which are substantiated by the undisputed June 9, 2000 counseling memo. Romanchik expresses the view that she does not know what else they could have done to help Hurdle. His work has been edited daily, he has had a mentor since June 2000, and DEQ paid for him to go to writing and communication classes at J.S. Reynolds again (following a 1994 course). Yet, he even blames the mentor for his continuing 2000 performance problems.

Nothing in his interrogatory response changes the fact that this employee has been given every opportunity to perform well and, as pointed out by the district court, presented no evidence to the Court that his treatment was race based. In its decision, the district court assumed that plaintiff's facts may have presented deficiencies in his training, but noted a complete absence of proof that the protected trait played a role in Freeland's conduct or that any of the deficiencies in their work relationship was due to a racist motivation. *See* App. at 16, which addresses Hurdle's failure to bring on proof of any circumstances

that could support an inference of race discrimination. By merely resting on his own opinion of himself and not filing any affidavits supporting his speculations, the case-law supports the court's decision that his *prima facie* case fails. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988).

The handwriting expert mentioned in no. 6 of the Questions Presented relates to an issue raised in his interrogatory response concerning the "fraudulent" editing of his correspondence by Freeland. *See* Petition at 18. Such an expert was used in a prior administrative grievance, but was not mentioned by Petitioner's prior counsel in written or oral submissions in his response to the Motion for Summary Judgment. Moreover, DEQ had objected to his designation as untimely and had moved to strike the expert's testimony. In addition, there is no expert report in the court's file opining that Supervisor Freeland is guilty of falsification or fraud.

### 3. Discriminatory Failure to Award Compensatory Time

The court found no evidence to support plaintiff's faulty belief that he was entitled to compensatory time for completing his "regular" work duties. The court considered the agency's chart (submitted to the EEO office of the Virginia Department of Human Resource Management, formerly the Department of Personnel and Training ("DPT") on "comp time," which was erroneously

described to the fourth circuit as "newly discovered evidence." It was included in the district court's record as Defendant's Encl. II, Exh. 3 (filed with the Defendant's Motion for Summary Judgment). This chart, which was discussed by the court and counsel extensively at oral argument, establishes that "comp time" was usually reserved for duties above and beyond one's regular duties and that on at least two occasions, Hurdle was awarded "comp time" by his supervisor Howard Freeland.

Without proof that he is *entitled* to pre-approval of compensatory time, Hurdle cannot establish a *prima facie* showing. *Keegan v. Dalton*, 899 F. Supp. 1503, 1513 (E.D. Va. 1995) (entitlement to benefit must be demonstrated). Nothing Hurdle states in his brief changes the fact that he simply wanted "comp time" to finish his annual reports, which represented his regularly assigned duties. His only proof that DEQ may have awarded it to others are hearsay statements attributed to co-workers Shawn Davis and Larry Syverson. Hurdle provides no proof and cannot rebut the information submitted to DPT. The chart in Encl. II, Exh. 3, clearly demonstrates that Hurdle got eight hours of "comp time" on the deadline date for the annual reports. His statement at his deposition that he saw Larry Syverson fill in time sheets for "comp time" is not accompanied with anything to prove that he got anything other than what is on the chart. Encl. I, Hurdle Depo. Tr. pp. 95-96. In sum, there is nothing before this Court to prove that the charted dates showing when Maria Williams and Larry Syverson received "comp time" are false. The evidence is that all staff members were

awarded compensatory time only for completing special duties. Hurdle was treated similarly to his counterparts.

**B. Racially Hostile Environment**

A plaintiff may establish a claim under Title VII, 42 U.S.C. § 2000e-2(a)(1) where harassment creates a hostile work environment affecting an employee's terms, conditions, or privileges of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Evaluating the alleged facts in the light of the requirements for a *prima facie* case of harassment also fails to produce a triable issue. In order to prevail on a hostile environment claim, Hurdle must prove that: (1) the employer harassed him because of his race; (2) the harassment was unwelcome; (3) it was sufficiently severe or pervasive to create an abusive working environment; and (4) there is a basis to impute it to the employer. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, *reh'g denied*, 121 S.Ct. 2246 (2001); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

Because Hurdle's evidence does not establish that he was subjected to sufficiently "severe or pervasive" altered work conditions, he cannot prevail as a matter of law. *Hawkins v. PepsiCo*, 203 F.3d 274, 276 (4th Cir.), *cert. denied*, 121 S.Ct. 181 (2000), is directly on point and dismisses a similar long list of allegations of inadequate instructions, unfair evaluations, and lack of access to a supervisor as not meeting the totality of circumstances test established in *Harris v. Forklift Sys.*, 510 U.S. at 21. Compare instead the actionable facts proven in *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183-84 (4th Cir. 2001), in

which the employee was treated to years of daily and relentless racial epithets that caused him to quit twice.

Like the employee in *Mathis v. Perry*, 996 F. Supp. 503, 515 (E.D. Va. 1997), Hurdle tries to cobble together everything and anything that has occurred to show race-based animus. At best, he can only prove that he and his supervisor disagree about his two-year experience as a permit writer. The isolated remarks attributed to Freeland are arguably rude, but not racist. He has no witnesses to show otherwise. Such trivial comments do not constitute an abusive environment. *Faragher*, 524 U.S. at 788; *Mathis*, 996 F. Supp. at 522. The documentation of good faith counseling sessions, training opportunities and the provision of a mentor belie any race-based hostility. As in *Mathis*, each evaluation was approved by several levels of supervisory personnel, none of whom have been shown to have discriminatory intent. Judging the totality of the circumstances, shows that Hurdle's two years under Freeland's supervision is not both objectively and subjectively hostile. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21-22 (1993).

As instructed in *Harris v. Forklift*, 510 U.S. at 23, and applied in *Smith v. First Union*, 202 F.3d 234, 242 (4th Cir. 2000), all of the circumstances must be evaluated, including: 1) frequency of conduct; 2) severity; 3) whether it's physically threatening or merely offensive; and 4) whether it unreasonably interferes with the employee's performance.

Even assuming Petitioner's litany in Interrogatory no. 4 is true; there is nothing severe that alters his work environment. This is particularly true given the mentor relationship and Freeland's, Romanchik's and Syverson's

daily editing and counseling attempts to improve this employee's work product and the undisputed fact that he was able to meet the August 1, 2000, annual report deadline.

In sum, the actual setting and circumstances surrounding the previously described "malicious and condescending" comments by Howard Freeland are set forth in Freeland's affidavit and unrebutted by Hurdle. The district court's analysis of this record also is consistent with sustained teachings of this court and interpretations of what constitutes an actionable hostile environment. As stated in the April 24, 2001, ruling of this Court in *Clark County Sch. Dist. v. Breeden*, 121 S.Ct. 1508, 1510 (2001), "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment," *quoting Faragher*, 524 U.S. at 788. Hurdle's description – shown only through his affidavit, deposition concessions and interrogatory response – shows only that he felt he was poorly trained and unfairly evaluated. Again, the district court appropriately held that because his evidence of race based hostility was limited to his own subjective accounts, it fell short of severe and pervasive racial harassment.

### C. Retaliation

Under § 704(a) of Title VII, it is unlawful for an employer to discriminate because plaintiff has opposed unlawful employment practices or filed a charge of discrimination. To establish a *prima facie* case, Hurdle must

show: (1) he engaged in a protected activity; (2) the employer took adverse action; and (3) there was a causal connection between the two. *Karpel v. Inova Health Sys. Serv.*, 134 F.3d 1222 (4th Cir. 1998), *citing Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). There are two types of protected activities: participation in an ongoing investigation or proceeding under Title VII, or opposing discriminatory practices prohibited by Title VII, 42 U.S.C. § 2000e-3(a). *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). The district court did not differentiate between the two, but simply found that the protected activity was the August 1999 claim filed with the EEO Office of the Virginia Department of Personnel and Training.

In regard to the adverse action, the record is clear that Hurdle's negative evaluations by Howard Freeland began on July 16, 1999, and, therefore, occurred *prior* to the state charge or any other EEOC charges being filed. In *Clark County Sch. Dist. v. Breeden*, 121 S.Ct. 1508, 1511 (2001), this Court clearly held that such a scenario is not actionable retaliation: "Employers need not suspend previously planned [adverse action] upon discovering that a Title VII suit has been filed, and their proceeding along the lines of previously contemplated, though not yet definitively determined, is not evidence whatsoever of causality."

The record also is undisputed that the contested 1999 performance evaluation was changed in accordance with Hurdle's wishes. DEQ Manager Paylor recalls that the upward revision was intended to give plaintiff the benefit of the doubt and another year of training. He also was given his expected raise in 1999, and thus, suffered no

adverse employment action. The fourth circuit recently held in *Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001), that a lowered annual performance review with absolutely no impact on salary is not an "adverse" employment action. In that case, the court reviewed the statutory language in 42 U.S.C. § 2000e-(2), as analyzed in *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985), and *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 243 (4th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998), and concluded that in order to be adverse and, thus, actionable under the anti-retaliation provisions, the action must affect the "terms, conditions or benefits" of employment. Like *Gunten*, Hurdle's evaluation did not affect his salary and, thus, is not actionable.

Temporal proximity is the way to prove the causation element of retaliation. As previously demonstrated, Hurdle does not have this in his favor. The district court properly found no causal relationship between the protected activity and the alleged adverse employment action of failing performance reviews in 1999. As in *Mathis v. Perry*, 996 F. Supp. 503, 515 (E.D. Va. 1997), the supervisor found fault with the employee's work well before the EEO complaint. As in *Clark County*, the employee's transfer was contemplated well before the protected activity. Hurdle's performance had been poor throughout the two-year period under review and the consistent feedback was caused by that and nothing else.

Even scrutinizing the events immediately after the lawsuit was filed, it is clear that Hurdle himself requested the interim performance meeting by way of a grievance dated May 15, 2000. He demanded this meeting and far from being retaliatory, the participants in the meeting did

everything they could to ensure that his Fall 2000 evaluation would be good: reviewing progress from two classes at J. S. Reynolds, assigning a mentor, and encouraging him to go see his doctor for his claim that his forgetfulness was due to medical problems – all this, despite being faced with a lawsuit. The counseling memo issued on July 28, 2000, for missing a staff meeting could not be retaliatory since it carried no disciplinary effect. Tying any of his supervisor's feedback to the May, 2000 filing of the lawsuit or the July 27, 2000, pre-trial conference at the district court is a ludicrous attempt to bolster this failing retaliation claim. Likewise, the August 2000 correspondence tracking sheet problem recited in the interrogatory response was put on hold until the agency's correspondence was audited, and no adverse employment action was taken against anyone as a result.

Even assuming that Hurdle presents a *prima facie* case of retaliation for DEQ's actions following either the DPT filing, the EEOC claim or the lawsuit, the burden shifts to DEQ to prove the legitimate, non-retaliatory reasons for their actions. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Again, under clear precedent of this Court, the respondent's burden is to produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by retaliatory animus. Because none of the asserted rationales have been effectively called into question as being false or contrived, Hurdle fails to establish an inference of discrimination through retaliation and he cannot escape an award of summary judgment.

### D. Due Process Claims

As originally plead, this case raised, as a separate count, a claim under 42 U.S.C. § 1981. Prior counsel abandoned this approach in apparent recognition that no individual "state actor" had been named as a party defendant and that the agency is not a proper party in a § 1981 case. Neither the Commonwealth nor DEQ, a state agency, are "persons" within the meaning of 42 U.S.C. § 1981. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). The first three Questions Presented by Petitioner list due process violations and page 1 of the Petition lists several Amendments to the Constitution of the United States. All of this apparently relates to the old, abandoned theory of recovery. Any attempt to claim due process deprivations or unconstitutional infringement of contract must be dismissed for the failure to name an individual defendant.

## CONCLUSION

The employer's evidence in support of its Motion for Summary Judgment was overwhelming in this Title VII suit. As set forth in the Respondent's Questions Presented and the accompanying arguments, the district court thoroughly reviewed the record in light of the controlling law on each count and issue. Moreover, the lower court also applied all reasonable inferences in favor of the employee and found that no reasonable juror would find his descriptions of these workplace disputes as being

motivated by intentional racial animus. There was no proof that the reasons taken for the employment actions at issue were false and, thus, no inference of discrimination could be reasonably drawn. For this reason, the judgment of the Fourth Circuit Court of Appeals contains no error and must be affirmed.

Respectfully submitted,

VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY

JERRY W. KILGORE
Attorney General of Virginia

JUDITH WILLIAMS JAGDMANN
Deputy Attorney General

GUY W. HORSLEY, JR.
Senior Assistant Attorney General

*MARTHA M. PARRISH
Assistant Attorney General
VSB No. 21851
*Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-5632